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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992	)	
	)	
Rate Regulation	)	

TO: The Commission

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. (MPAA) hereby submits its comments on the Commission's "Notice of Proposed Rulemaking" (FCC 92-544) in the above-referenced proceeding.

I. Rate Regulation Should Not Inhibit the Pass-Through of Programming Costs to Consumers

At this stage of the proceeding, it is unclear whether the Commission will take a "benchmark" approach or a cost-of-service approach to the regulation of the "basic service tier" and the regulation of "cable programming services" (i.e., video program offerings other than the "basic service tier" or those offered on a per-channel or per-program basis). However, regardless of the mechanism chosen, we believe that the Commission should ensure that cable operators may pass programming costs through to their subscribers in their entirety, with a reasonable profit.

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Congress plainly did not intend that rate regulation should harm program providers in their ability to reach the greatest possible audience or to recoup the market value of their works, or reduce consumer access to all the programming they desire. Quite the opposite -- Congress intends that the net effect of the 1992 Cable Act should be greater program diversity and consumer choice.[1]

In directing the Commission to adopt a regulatory framework for the basic service tier under Section 623(b), Congress requires that the Commission take into account seven factors, including "the direct costs... of obtaining, transmitting and otherwise providing signals carried on" that tier. The basic tier offered by any operator must include must-carry signals, PEG access programming, and certain other broadcast signals, but may include any "additional video programming signals or services" in the operator's discretion, provided that such additional programming is also subject to regulation. The Commission correctly concludes that Congress has not required the agency to give relatively more or less weight to any of these factors, leaving the Commission free to achieve "a reasonable balancing of these statutory goals and

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[1] See, e.g., Section 2(a)(6) of the 1992 Act: "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media;" see also sections 2(a)(4), 2(b)(5). The desire of Congress not to hinder programmers in their ability to reach audiences is also evidenced by the provisions of Section 12 of the 1992 Act relating to regulation of non-broadcast video programming carriage agreements.

factors."[2]

Similarly, in directing the Commission to establish guidelines for determining whether the rates charged by an operator for "cable programming services" are "unreasonable" under Section 623(c), the Commission is permitted to consider, "among other factors,... capital and operating costs" of the system, including programming costs.

Reflecting the goals of the statute, the Commission has expressed its sensitivity to the potential impact of rate regulation on "future growth of services and of programming."[3] The Commission also has expressed concern about "the extent to which [its] rate regulations should not effectively restrict a cable operator's discretion to provide programming on the basic tier beyond the minimum statutory components."[4] Moreover, in discussing the possible adoption of direct-cost guidelines, the Commission suggests that it "could set guidelines that permit higher basic service tier rates in order not to discourage offering of a broader basic service tier with a large number of channels..."[5]

The Congressional solicitude toward the legitimate interests of programmers, and the Commission's sensitivity toward these

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[2] NPRM at para. 31.

[3] NPRM at para. 5.

[4] NPRM at para. 32.

[5] NPRM at para. 55.

matters, are well-founded. There is nothing in the statute or legislative history to suggest that consumers need to be protected in any way from cable service prices which reflect the actual costs of programming, duly negotiated between programmer and cable operator. The programming marketplace is highly and increasingly competitive. Programming supply continues to exceed channel availability. Any rate regulatory scheme that artificially represses programming prices threatens to undercut diversity and consumer choice with no offsetting public benefit. There is simply no reason to penalize programmers, whose efforts give cable service its value, by placing unnecessary restrictions on their ability to negotiate a fair price for their programming.

Whatever form of rate regulation the Commission may adopt, we urge that it permit the pass-through of programming costs in their entirety and that the rules permit the cable operator to make a reasonable profit on these expenditures.

Finally, to the extent that the Commission directly regulates operators' prices based on cost, it should allow operators to fairly and reasonably allocate joint and common costs such as administration, maintenance and marketing to the basic service tier.

II. Cable Operators Must Provide Billing and Collection Service as Part of their Leased Access Service Offerings

The Commission, without substantiation, "tentatively conclude[s] that the Cable Act of 1992 does not necessarily require cable operators to provide billing and collection services" and that "Congress intended only that [the Commission] establish regulations governing the maximum rate for such services only if an operator chooses to offer them."[6] We believe this conclusion is in error. The Commission must require operators to provide billing and collection services, must establish cost-based rates for such services, and must ensure that "any charges for billing and collection services... be unbundled from other charges for leased commercial access."[7]

Failure to require that cable operators provide billing and collection services for channel lessees would be entirely inconsistent with both the statutory directive and the intent of Congress as reflected in the legislative history, and it would eviscerate Congress' stated goals regarding leased access. The Commission plainly lacks the authority to excuse cable operators from offering billing and collection services for leased access users.

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[6] NPRM at para. 146.

[7] Id.

Congress first adopted the concept of leased commercial access on cable systems into statute in the 1984 Cable Act with the goal of promoting programming diversity by encouraging carriage of services that the cable operator might, in its business judgment, not wish to offer to its subscribers directly. As a practical matter, the provisions of the 1984 Act have failed. They left the would-be lessee facing insurmountable barriers to access.

The leased access provisions were substantially revised by the 1992 Cable Act. Congress explicitly revised its statement of the purpose of leased access to include the goal of increasing "competition in the delivery of diverse sources of video programming."[8] The heart of this proceeding is the Senate's directive that "it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers."[9]

The statute directs the Commission to "determine the maximum reasonable rates that a cable operator may establish... for commercial use of designated channel capacity, including the rate charged for billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use".[10] The statute further directs the Commission to "establish reasonable terms and conditions for such use, including those for billing and

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[8] Section 612(a), as amended.

[9] Senate Rpt 102-92 at 79 (hereinafter "S.Rpt.").

[10] Section 612(c)(4)(a)(i) (emphasis added).

collection..."[11] In mandating the Commission to establish such rules, terms and conditions within 180 days, the statute nowhere suggests that a cable operator is free not to offer billing and collection services.

During Congressional consideration of what became the 1992 Cable Act, both bodies gave detailed consideration to the shortcomings of the leased access provisions in the 1984 Act, and each developed provisions intended to involve the Commission directly in promoting the successful function of leased access, specifically including billing and collection.

The House bill, at Section 18, required the Commission to establish, by regulation, standards concerning, among other things, "methods for collection and billing for commercial use of leased access."

The Senate bill's provisions on leased access comprise the bulk of what appeared in S. 12 as passed by the Congress.[12] The Senate Committee report elaborates on the purposes of leased access and the practical constraints facing a would-be lessee:

> To be successful, a [leased access] programmer may well have to be carried on many cable systems and thus have to negotiate leased access rates with many operators. Because of the

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[11] Section 612(c)(4)(A)(ii) (emphasis added).

[12] The Senate Report also makes it clear that under the new Act the Commission is "require[d] [to] establish the maximum reasonable rate and reasonable terms and conditions for use of these commercial access channels and for the billing of rates to subscribers, and for the collection of revenue from subscribers by the cable operator for such use." S.Rpt. at 79 (emphasis added).

> uncertainty caused by [the] provision [in the 1984 Act], a programmer would almost certainly see this as a hopeless task... For a programmer to have any chance of success, the programmer must negotiate many elements -- a reasonable rate for access and then for billing and collection and then reach an agreement on key terms and conditions, for example, tier and channel location -- and, as stated above, repeat this negotiation for each system.[13]

The availability of billing and collection services on reasonable terms and conditions is considered central to the success of leased access as "an important safety valve for anticompetitive practices... The legislation carries out this intent by requiring that the FCC establish maximum reasonable rates for access to these channels, as well as for billing and collection."[14]

As potential leased access users, the programmers represented by MPAA can attest to the lack of viability of leased access under the 1984 Act and the practical challenges of making leased access work. Simply making channel access more readily available to programmers would do little or nothing to promote leased access absent similar access to billing and collection services. Each cable operator has an established and efficient billing relationship with its subscribers. Its system-by-system incremental costs of billing and collection are far less than those that the leased access programmer would face on a national or regional basis.

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[13] S.Rpt. at 31-2.

[14] S.Rpt. at 32 (emphasis added).

In order for the Commission to carry out faithfully the Congressional mandate to make leased access "a genuine outlet for programmers," it must "use its authority" to require that every cable operator obligated to offer leased access under the 1992 Act must also offer billing and collection services on a fair, unbundled, cost-based rate-regulated basis.

Respectfully submitted,

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